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By Rebecca A. Robbins*

## I. Introduction

Globalization has been touted as the 'rising tide that will lift all ships.' Ironically, the 'tide' seems to be passing traditional fishers by, and quite literally sinking their ships. Fishers in the U.S. from Alaska to Louisiana, and globally from India to Chile, are in fact being forced to sell their boats because the prices they can get for their catch are so low that even leaving port is a losing financial proposition.[1] These traditional fishers, many of whose methods are among the least harmful environmentally,[2] are being replaced by far more environmentally detrimental industrial fisheries and aquaculture.

Globalization—a complex term itself which refers to a huge range of things all related to moving from local economies to a more global economy[3]—alone can-

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1. *See* Victor Menotti et al., *Not Fish-Friendly: The WTO's New Doha Agenda for Fisheries*, FISHERMAN'S NEWS (April 2002) *available at* http://www.pcffa.org/fn-apr02.htm (last visited Apr. 24, 2005).

2. *See infra* discussion at Section II.

3. Globalization refers to the move since World War II, which has gained significant momentum in the last few decades, from local economies to a more global economy. ALTERNATIVES TO ECONOMIC GLOBALIZATION: A BETTER WORLD IS POSSIBLE 17 (John Cavanagh & Jerry Mander eds., 2nd ed. 2004). The institutional arbiters of globalization are the Bretton Woods institutions—the World Bank, the International Monetary Fund (IMF) and the World Trade

not be blamed for all of the problems the small-boat fishers face.[4] However, increased trade and a flourishing aquaculture industry, which have emerged in recent decades under the guidance of globalization's arbiters—the International Monetary Fund (IMF), the World Bank and the World Trade Organization (WTO)—have played a prominent role.[5]

For fisheries, globalization has compounded the existing problem of overfishing by creating an ever-expanding demand for fish worldwide and has encouraged the advent of aquaculture as a means of meeting this demand. At the same time, free trade rules promulgated by the World Trade Organization (WTO) have opened up national borders to foreign investment, making the types of international funding necessary to support aquaculture facilities possible.[6] In combination with the need for "cash crops" to export to pay off debts to inter-

Organization (WTO). *Id*. According to the IMF itself, globalization is the "increasing integration of economies around the world, particularly through trade and financial flows. The term sometimes also refers to the movement of people (labor) and knowledge (technology) across international borders." IMF, GLOBALIZATION: THREAT OR OPPORTUNITY? (Apr. 12, 2000 (Corrected Jan. 2002)), *at* http://www.imf.org/external/np/exr/ib/2000/041200.htm#II (last visited Apr. 19, 2005). Economic globalization includes a huge array of human and societal functions and has meant food, commodities and even services which were once traded locally are now shipped around the world, and the golden arches of McDonalds are visible on the horizon of major cities around the globe. *See id*. The WTO, as the institution responsible for promulgating the "rules" for globalization has set out guidelines that essentially require opening markets up to "free trade" in a variety of sectors. The Dispute Settlement Body (DSB) of the WTO hears cases when one WTO member feels another member is illegally closing its markets or discriminating against their products. *See* WTO, *Dispute Settlement*, *at* http://www.wto.org/english/tratop_e/dispu_e/ dispu_e.htm (last visited Apr. 24, 2005).

4. The debate over globalization's overall impacts—positive or negative—is part of a much broader discourse, and is the subject itself of many books and papers. I reference it briefly here for background. While globalization was touted as a force which would bring economic prosperity to poor countries and allow all nations greater access to wealth, in reality globalization has done quite the opposite: "It has not lifted the poor; it has instead brought record disparities in income and wealth between rich and poor nations, and rich and poor within nations." ALTERNATIVES TO ECONOMIC GLOBALIZATION, *supra* note 3, at 17. See *also* IMF, GLOBALIZATION: THREAT OR OPPORTUNITY?, *supra* note 3, agreeing that economic disparity between countries has increased in the last century. While globalization proponents argue that opening markets has allowed previously impoverished communities in developing countries to earn money working in factories which produce items for export, allowing all countries equal access to wealth, the economic trends of the past decade have proven this wrong. *See id*. Globalization's advocates also argue that it would end world hunger by giving developing countries access to export markets and the production process. *See* FOODFIRST, *12 Myths About Hunger*, *at* http://www.foodfirst.org/pubs/backgrdrs/1998/s98v5n3.html (last visited Feb. 9, 2005). The experience of past decades has shown quite a different reality—in fact, export-based & genetically engineered crop dependent systems of agriculture pushed and encouraged by WTO policy have not only forced farmers off their traditional lands, but have caused an epidemic of suicides in farmers throughout the global North and South as farmers watch their farms disappear. *See id*. *See also* Vandana Shiva, *The Suicide Economy of Corporate Globalisation* (originally published Apr. 5, 2004 on Znet), *at http://www.countercurrents.org/glo-shiva 050404.htm* (last visited Apr. 5, 2005). Furthermore, the production of food products in developing countries for import to the developed world has done little to increase food supplies at home, sometimes even harming local food supplies. ALTERNATIVES TO ECONOMIC GLOBALIZATION, *supra* note 3, at 41.

5. *See* Rosamund L. Naylor et al., *Salmon Aquaculture in the Northwest: A Global Industry with Local Impacts*, ENVIRONMENT, Oct. 2003, at 18, 20.

6. Menotti et al., *supra* note 1.

national financial institutions such as the World Bank and the IMF, the so called "Blue Revolution" has brought the advent of aquaculture on a global scale.[7] Aquaculture, however, simultaneously creates social problems as well as its own set of environmental concerns.[8] Aquaculture has put many traditional fishers out of business while at the same time causing irreparable damage to the environment and impacting communities worldwide.[9] Wild-caught salmon, for instance, accounted for more than 99 percent of salmon consumed worldwide in 1980.[10] In 2003, "only 40 percent of the world's salmon [was] caught by commercial fisheries."[11]

Saving traditional fisheries from disappearing entirely can simultaneously protect the important community, cultural and economic values they provide while saving our oceans from the environmental degradation imposed by industrial fishing and aquaculture.[12] There are many possible ways to address the environmental and community impacts of aquaculture and the harms to traditional fishing communities.[13] International treaties such as the U.N. Fish Stocks Agreement, domestic laws such as the Magnuson-Stevens Act, marketing campaigns and eco-labeling schemes all offer potential solutions. Since domestically the current U.S. government seems more committed to encouraging aquaculture within the U.S. than limiting exports,[14] and internationally, the free trade system under the WTO seeks ever more to eliminate all barriers to trade, including some environmental regulation, there are few legal tools left with which to protect our natural resources and the communities whose livelihoods depend on these resources.[15]

7. Alfredo Quarto, *The Rise and Fall of the Blue Revolution*, SWARA, *at* http://www.earthisland.org/map/blrvl.htm (last visited Apr. 5, 2005).

8. Note that these environmental impacts are in addition to those inherent in a globalized system of trade - the direct environmental impacts from increased transport of goods around the globe are hard to deny. Most items in global trade are transported by ships which use "Bunker C" oil, a low-grade oil which is "particularly polluting because of high levels of carbon and sulfur." ALTERNATIVES TO ECONOMIC GLOBALIZATION , *supra* note 3, at 42.

This and the refrigeration required to ship perishables contribute to global warming. Kumar Venkat, *Global Trade=Global Warming* (originally published Dec. 11, 2003 on Salon.com), *at* http://www.commondreams.org/scriptfiles/views03/1211-02.htm (last visited Apr. 5, 2005). Increased ocean shipping also means increased ocean pollution, which has obvious impacts on fisheries and ocean ecosystems. ALTERNATIVES TO ECONOMIC GLOBALIZATION, *supra* note 3, at 42. Air transport is even worse—"each ton of freight moved by plane uses forty-nine times as much energy per kilometer as when it's moved by ship." *Id.*

9. MICHAEL L. WEBER, SEAWEB AQUACULTURE CLEARINGHOUSE, WHAT PRICE FARMED FISH: A REVIEW OF THE ENVIRONMENTAL AND SOCIAL COSTS OF FARMING CARNIVOROUS FISH 5-6 (2003).

10. Josh Eagle et al., *Why Farm Salmon Outcompete Fishery Salmon*, MARINE POLICY 1 (2003).

11. *Id.*

12. I will use the term "traditional fisheries" throughout to refer to small-boat fishers. This by no means includes factory ships, trawlers or other environmentally destructive industrial fishers, but instead refers to smaller scale, less technological fisheries, exemplified best by the salmon fishery.

13. *See* Naylor et al., *supra* note 5, at 18, 32-36.

14. *See* Natasha Benjamin, Institute for Fisheries Resources, *Aquaculture's Next Wave Threatens To Swamp Commercial Fisheries Moving Offshore, Out Of Sight And Free Of Scrutiny*, FISHERMEN'S NEWS, Dec. 2002, *available at* http://www.pcffa.org/fn-dec02.htm (last visited Apr. 4, 2005).

15. WTO panels have in fact struck down environmental laws on several occasions. In "Tuna I," Mexico initiated GATT dispute settlement proceedings against the U.S., claiming that the

Given the current regulatory atmosphere, solutions aimed at helping "wild"[16] fish fishers compete may be more feasible politically. Currently, consumer pressure is perhaps one of the most useful tools—the recent positive changes for the wild salmon fishery are due in large part to increasing consumer knowledge of the dangers of farmed fish. Restructuring fisheries management laws, restructuring fishing industries and reducing subsidies may also prove valuable long-term tools, specifically in the salmon industry.[17] In the short term, while we are working on more long-term solutions, however, anti-dumping laws may offer one of the few remaining means to, if not reverse economic globalization, at least minimize its impacts in the fisheries sector. Anti-dumping cases against farmed fish have proven helpful in protecting the domestic wild-fish industry in the recent past—a case against Norwegian farmed salmon in the early '90s almost completely eliminated Norwegian salmon from the U.S. market.[18] Anti-dumping laws thus may provide a solution now too.

"Dumping" is defined generally as selling a product in another country at less than its "fair market value" in the country of origin.[19] Anti-dumping laws seek to curb dumping by imposing anti-dumping duties on products being

restrictions set out in the Marine Mammal Protection Act (MMPA), requiring a ban on yellowfin tuna caught in a manner that did not meet set standards for dolphin kills, constituted a barrier to trade. Lakshman D. Guruswamy, S*hould* UNCLOS *or* GATT/WTO D*ecide* T*rade and* E*nvironment* D*isputes*, 7 MINN. J. GLOBAL TRADE 287, 314 (1998).

In "Tuna II," the EU challenged the provision of the MMPA which mandated that an intermediary country exporting tuna to the U.S. also comply with dolphin kill reporting requirements in the GATT, and the panel once again ruled that the U.S. law constituted a barrier to trade. I*d*. Under WTO rules, in what is known as the "shrimp turtle" case, India, Malaysia, Pakistan and Thailand challenged the U.S. law which required that all trawl-caught shrimp imported to the U.S. must have been caught with a trawl using a Turtle Excluder Device (TED) because sea turtles are listed in the U.S. as endangered under the Endangered Species Act. S*ee* WTO Appellate Body Report on United States—Import Prohibition Of Certain Shrimp And Shrimp Products, WT/DS58/AB/RW (22 October 2001), *available at* http://dosconline.wto.org (via search function) (last visited Apr. 6, 2005). The law was struck down by the WTO panel and the U.S. was no longer allowed to require that shrimpers haul TEDs in their nets. I*d*.

Furthermore, a review of WTO cases by Public Citizen, a non-profit advocacy group, shows that "with only two exceptions, every health, food safety or environmental law challenged at the WTO has been declared a barrier to trade." Lori Wallach &Patrick Woodall, T*he* WTO*'s* C*ontroversial* D*ispute* S*ettlement* P*rocedure*, *excerpts from* WHOSE TRADE ORGANIZATION? THE COMPREHENSIVE GUIDE TO THE WTO, *at* http://www.citizen.org/trade/wto/articles.cfm?ID=10446 (last visited Apr. 5, 2005).

16. While I will refer to fish caught by commercial fisheries as "wild" throughout this article, it is important to note the slight inaccuracy of this term, particularly in regard to Alaska salmon - about 20 percent of the commercial salmon catch in Alaska is actually hatchery fish which are raised in hatcheries before being released into the ocean. Eagle et al., *supra* note 10, at 1.

17 I*d*. at 8-11.

18 S*ee* Lisa Duchene, S*almon* M*arket* M*atures*, SEAFOOD BUSINESS (June 2001), *at* http://www.seafoodbusiness.com/archives/01jun/issue.html (click on "More" link for full article) (last visited Apr. 27, 2004).

19 Agreement on Implementation of Article VI of the General Agreement On Tariffs and Trade 1994, Apr. 15, 1994, art. 2.1, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations General Agreement on Tariffs and Trade [hereinafter GATT Agreement], Annex 1A, 1994 WL 761483 (G.A.T.T.), *available at* http://www.wto.org/english/docs_e/legal_e/19-adp_01_e.htm [hereinafter Anti-dumping Agreement].

dumped on the market. Not surprisingly, anti-dumping laws, as currently constructed, are being challenged as a "protectionist" measure and are targeted for reform on the Doha agenda, an agenda of decisions to be made in the ongoing round of WTO negotiations that was adopted at the WTO ministerial meeting in Doha, Qatar, in 2001.[20] The reform agenda is aimed primarily at U.S. laws, since the U.S. is the leading initiator of anti-dumping investigations. Anti-dumping laws, while criticized as protectionist, may in fact serve as a way to assist impacted traditional fishing communities, and in doing so, may save communities around the world from the environmental, social and human rights impacts of aquaculture.

This note will examine the potential usefulness of U.S. and WTO anti-dumping laws in protecting marine resources and traditional fishing communities. I will examine the value of traditional fisheries and the harms inherent in present-day aquaculture techniques in Part II, U.S. and WTO anti-dumping laws in Part III, and the applicability of anti-dumping laws to wild-capture fisheries in general and the Alaska salmon industry in particular in Part IV to answer the question: can anti-dumping laws help protect traditional fishers and the environment?

## II. Aquaculture: A Poor Substitute for Traditional Fisheries

In recent decades aquaculture has taken a place in the market as a primary means of seafood production—farmed salmon production has increased by five times since the late 1980s.[21] While aquaculture arose in part in reaction to ever-diminishing ocean stocks, it has also been pushed by the World Bank and the IMF internationally as a source of export "cash crops" that developing countries can sell to raise money to pay back their development loans.[22] While now a substantial component of the global seafood industry, aquaculture is itself laden with environmental problems and is thus an unacceptable substitute for fish harvested in a sustainable manner by traditional fishers. The corporate-dominated aquaculture industry is likewise an unacceptable substitute for the cultural and social benefits traditional fisheries provide to their communities.

### A. Environmental Impacts of Aquaculture

The environmental harms in fish farming include harm to water quality, threats to wild stocks, and genetic contamination. First, because farmed fish are for the most part held in pens in the ocean, everything in the pens has the potential to pollute the surrounding ocean as well. Excess food and all waste from the pens enters the ocean ecosystem, and the effluent released from a salmon farm is no small amount:

> A salmon farm of 200,000 fish releases an amount of nitrogen, phosphorous, and fecal matter roughly equivalent to the nutrient waste in the untreated sewage from 20,000, 25,000, and 65,000 people, respectively. Many farms in the Pacific Northwest contain four to five times that number of fish. In 1997, 4 out of about 12 salmon farms in Washington discharged

20. S*ee* WTO Doha Ministerial Declaration, WT/MIN(01)/DEC/1, ¶ 28 (Nov. 20, 2001), *available at* http://docsonline.wto.org/ (via search function) (last visited Apr. 5, 2005) [hereinafter Doha Declaration].

21. Naylor et al., *supra* note 5, at 18, 19.

22. S*ee* Alfredo Quarto, *supra* note 7.

> almost as many 'total suspended solids' into Puget Sound as the sewage treatment plant serving Seattle.[23]

Beyond the water contamination from effluent, salmon farms also pollute the ocean with "antibiotics and other drugs, pesticides, feed additives, paints used on net cages and boats to prevent marine growth (antifouling paints), and disinfectants," all of which contaminate the surrounding ecosystem.[24] These releases pose a threat to native wild fish stocks as well as other native species.

Of potentially greater threat to wild stocks, however, is the threat posed by escaped farmed fish. These netpen escapees not only compete with wild fish for food, but can cause irreparable genetic contamination when they breed with wild stocks.[25] Because wild stocks are distinguished in part by their genetic make-up, breeding with farmed fish threatens the very existence of the species.[26] The threat to wild species is so great that in June 1997 the Washington State Pollution Control Hearings Board designated escaped farmed Atlantic salmon as a "living pollutant."[27] This threat would be compounded if genetically engineered fish were introduced—a likely proposition since at this point in time at least one company has an application pending with the FDA requesting approval to sell genetically engineered fish as food products. According to the Center for Food Safety, the genetically engineered salmon currently being reviewed by FDA is genetically engineered to grow as much as ten to thirty times faster than normal salmon.[28]

Wild salmon are also threatened by the spread of disease from salmon farms. According to the ocean conservation group, Oceana, "[w]herever there are salmon farms, there have been epidemic outbreaks of the salmon-specific salmon louse *Lepeophtheirus salmonis*. Entire runs of salmonids . . . have been harmed by sea lice proliferation near salmon farms in Ireland, Scotland and Norway."[29] The problem is compounded by the fact that salmon farming operations are oftentimes located in the paths of migrating wild salmon, which ensures that wild salmon will pass by farms and face exposure to disease.

Finally, aquaculture may actually increase pressure on other fish stocks. According to Oceana, "[i]t takes two to five pounds of other ocean fish, such as herring and anchovy to make the feed necessary to produce one pound of farmed salmon. For this reason, farming salmon

23. *Id*. (quoting REBECCA J. GOLDBURG ET AL., PEW OCEANS COMMISSION, MARINE AQUACULTURE IN THE UNITED STATES: ENVIRONMENTAL IMPACTS AND POLICY OPTIONS, (2001), *available at* http://www.pewtrusts.org/pdf/env_pew_oceans_aquaculture.pdf (last visited Apr. 5, 2005)).

24. Oceana, *Ocean Threats: Farmed Salmon*, *at* http://northamerica.oceana.org/index.cfm?sectionID=11&fuseaction=3&pageID=923 (last visited Apr. 5, 2005).

25. OTTO E. LANGER, DAVID SUZUKI FOUNDATION, IS THERE A BOTTOM LINE IN THE WILD SALMON – FARMED SALMON DEBATE? A TECHNICAL OPINION 3 (2003), *available at* http://www.davidsuzuki.org/files/Oceans/March03Ottotechnicalpaper.pdf (last visited Apr. 24, 2005).

26. *Id*.

27. Editorial, *'Polluting' Salmon No Joke*, SEATTLE POST-INTELLIGENCER, June 24, 1997, at A8.

28. *See* Center for Food Safety, *Genetically Engineered Fish*, *at* http://www.centerforfoodsafety.org/geneticall3.cfm (last visited Apr. 24, 2005).

29. Oceana, *supra* note 24.

creates a net global protein loss as most of the fish used to make feed pellets are high quality protein fit for human consumption."[30] This means that while pressure on wild salmon stocks may be alleviated, pressure on small fish stocks used to create fishmeal and fish oil will, in fact, increase, causing incalculable damage both to those fish stocks and to the interdependent ecosystem of which they are a part.[31]

### B. Social & Cultural Benefits of Traditional Fisheries

Aside from the environmental impacts of aquaculture, traditional fisheries also serve important cultural and community roles that would be obliterated by a full-scale adoption of aquaculture.[32] Fisheries are a vital part of the cultural make-up of many coastal communities and a central part of the identity of fishing towns. Few Alaskans are unaware of what fish are running in the summer, and coastal communities from Maine to Florida base their very identities on fishing culture. For native communities, fish play an even more important role, and in some rural areas, fishing provides the only income available.[33] Furthermore, in fishing communities, fisheries themselves support a vast web of support services—local grocery stores, restaurants, and fishing supply stores among many others depend on fishers's business.

Aquaculture, on the other hand, is the epitome of the faceless corporation. Worldwide aquaculture production is controlled almost entirely by a handful of multinational corporations (MNCs), many operating on foreign soil.[34] These MNCs are also highly vertically integrated—for instance, one company, Nutreco, "controls 40 percent of the world fish feed market."[35] Thus, unlike traditional fisheries which often support entire communities, aquaculture largely supports only the MNCs.[36]

Aquaculture also poses significant community and human rights concerns. In Chile, one of the leading importers of farmed salmon to the U.S., salmon is mostly farmed in the Lakes Region.[37] Production costs are minimal both because Chilean salmon farms are subject to even lower environmental standards than those in the U.S. and because labor is so inexpensive.[38] While globalization was supposed to increase incomes, the average wage for a Chilean salmon farm worker in 2001 was $199/month while the poverty level for a family of four in Chile that year was $240[39]—far from the high

30. *Id.*

31. Naylor et al., *supra* note 5, at 18, 31.

32. Note that commercial fisheries are by no means devoid of environmental impacts—salmon processing plants, for instance, create huge amounts of waste and are responsible for Clean Water Act violations. On the whole, however, at least in the case of Alaska salmon, the environmental impacts are far less than those of aquaculture. Eagle et al. *supra* note 10, at 9.

33. Commercial salmon fishing in the Yukon-Kuskokwim area, for instance is the only source of income and has been so for centuries. *Id.*at 3.

34. Naylor et al., *supra* note 5, at 21. "The firms include Nutreco (based in the Netherlands), Pan Fish, Fjord Seafoods, and Cermq (based in Norway), Stolt-Nielsen (based in Luxembourg), and George Weston (based in Canada). *Id.*

35. *Id.*

36. *Id.*

37. Neal Gilbertsen, *The Global Salmon Industry and its Impacts in Alaska*, ALASKA ECONOMIC TRENDS, Oct. 2003, at 5.

38. *Id.*

39. *Id.* at 6.

standard of living promised by globalization's advocates.

There is also significant concern about the morality and efficacy of farming fish such as salmon solely for export. Many proponents of aquaculture tout it as a way to end world hunger. There are two inherent problems with this claim, however. First, farmed salmon is rarely consumed in salmon-producing countries such as Chile, and the industry exists almost solely for export.[40] This sort of export-based fish production really only feeds already protein-glutted developed countries: no starving developing country is receiving a regular shipment of shrimp and salmon.[41] Second, because farming carnivorous fish requires using other fish as a food source, overall this does little to increase protein production and is, at best, an incredibly inefficient way to produce food. As Michael Weber says, "Feeding fish that we don't care for to fish that we like does little for world hunger."[42]

More importantly, while this sort of arrangement may create more food supplies and, if these supplies were distributed evenly, more food security, the move towards aquaculture and away from traditional fishing does little for food sovereignty. Food sovereignty has been advocated for in the farming community as "the right of local farmers to grow food for local consumers and the ability of each country to produce enough food to feed its own people."[43] Food sovereignty then, focuses not only on the right to have food to eat, but the right to produce that food for one's own community or country. This concept takes the emphasis away from large corporations producing food on a large scale, as in aquaculture, and places it on each community producing its *own* food to meet its needs.

Overall, from an environmental, social and cultural standpoint, traditional fisheries offer a viable and essential alternative to industrial fishing and aquaculture. Divorced from the profit requirements to which corporations must adhere (as many aquaculture operations do), small boat fishermen are more able to consider other values as they operate their businesses. As members of the communities in which they fish, traditional fisher people are more likely to be conscious of using sustainable fishing methods since destroying habitat this year means fewer fish next year.

## III. Anti-dumping Laws

While traditional fishing offers an environmentally and socially preferable alternative to aquaculture and industrial fishing, traditional fishers are at a constant competitive disadvantage particularly when it comes to aquaculture. Economies of scale, and the differences in cost between equipment used by traditional fishers and large aquaculture operations mean that wild-caught fish and farmed fish will rarely cost the same to

40. *See* INTRAFISH, 40 *percent growth in Chile's production*, *at* http://www.intrafish.com/intrafish-analysis/chile_15-11-2000_eng/feat04.php (last visited Apr. 27, 2005).

41. *See* Rick Boychuk, The Blue Revolution, NEW INTERNATIONALIST No. 234 (Aug. 1992), *at* http://www.newint.org/issue234/blue.htm (last visited Apr. 27, 2005).

42. MICHAEL L. WEBER, FARMING SALMON: A BRIEFING BOOK, A*quaculture* (1998), *available via* the web page of the SeaWeb Aquaculture Center at http://www.seaweb.org/resources/sac/reports.shtml (last visited Apr. 27, 2005).

43. Press Release, Foodfirst, Food Sovereignty: Global Rallying Cry of Farmer Movements (Dec. 3, 2003) (on file with author).

produce. Furthermore, as supply increases due to aquaculture production, prices decline due to the laws of supply and demand.[44] The environmental costs associated with aquaculture are almost completely externalized,[45] giving these products a falsely low price. Traditional fishers livelihoods are threatened when the price charged for farmed fish is lower than the costs involved in catching wild fish. When dumping is occurring, and farmed fish are being sold at a price even below the cost of production, it makes it even harder for traditional fishers to compete. Since, from an environmental standpoint, the wild fish product is much more desirable than the farmed product, protecting traditional fishers helps not only fishing communities, but ocean resources as well. Anti-dumping laws can help traditional fishers where imported fish products are being sold at a lower price in the U.S. than in the country of origin.

Anti-dumping laws exist on both the domestic and global level. While an anti-dumping case is first brought domestically, it can be challenged in the WTO if the country accused of dumping feels the anti-dumping laws were applied in a manner inconsistent with WTO law.

### A. Anti-dumping Laws in Global Trade: A Brief History

While anti-dumping laws, both in the WTO and nationally, may be subject to criticism, they are certainly no new feature to the global trading system. As the world gradually became more globalized towards the end of the nineteenth century, national concern for the potential impacts international trade would have on domestic industries led many countries to adopt anti-dumping laws.[46] In the early part of the nineteenth century, Canada, New Zealand, and South Africa all adopted anti-dumping laws, with the United States following soon thereafter.[47] Germany, with its emerging industrial capabilities in the pre-World War I days, presented a particular threat. More than one country, unequipped with anti-dumping laws, found itself a target of German dumping.[48] After the war, countries removed their protectionist barriers to some degree, but Australia, Great Britain, New Zealand and the United States not only kept their anti-dumping statutes on the books, but strengthened them, while Canada kept its earlier legislation.[49] Not surprisingly, these early institutors of anti-dumping policies have been the most frequent bringers of anti-dumping actions: since 1979, when the Tokyo Round Anti-dumping Code was adopted, Australia, the European Union, the USA and Canada "were responsible for bringing more than 90 percent of all such action by GATT members."[50] Anti-dumping laws were included in the original 1947 General Agreement on Tariffs and Trade (GATT) as the Agreement on Implementation of Article VI and the Agreement on Subsidies and Countervailing Measures.[51] The "Kennedy Round" of GATT negotiations, which began in 1963, included negotiations on anti-dumping, resulting in the 1968 Agreement on the Implementation of Article VI.[52]

44. Eagle et al., *supra* note 10, at 4.

45. Externalization refers to the economic process by which costs (here environmental costs) are not reflected in the price of a good and are instead "external" to that cost.

46. Terence P. Stewart et al., Anti-dumping 8 (1994).

47. I*d*. at 9.

48. I*d*.

49. I*d*. at 13.

50. Keith Steele, Anti-dumping Under the WTO: A Comparative Review 2 (1996).

51. I*d*.

52. Stewart et al., *supra* note 46, at 48.

Anti-dumping was also addressed in the Tokyo Round of negotiations, which lasted from 1973 to 1979, culminating in the adoption of a new code in 1979.[53]

## B. Anti-dumping Laws in the GATT/WTO

The Agreement on Implementation of Article VI of GATT 1994 (Anti-Dumping Agreement) governs anti-dumping in the WTO today.[54] The GATT anti-dumping laws are very similar to U.S. anti-dumping laws, discussed below. In brief, the Anti-Dumping Agreement sets out that dumping will be considered to exist if "the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country."[55] For purposes of the agreement, a "like product" is considered to be an identical product, "i.e. alike in all respects" or, "in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration."[56] Furthermore, an anti-dumping suit requires injury to the domestic industry in question. Under WTO rules, injury is determined by looking at both "(*a*) the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and (*b*) the consequent impact of these imports on domestic producers of such products."[57] An anti-dumping margin is determined by comparing a "weighted average normal value" of prices in the home country to a "weighted average of prices of all comparable export transactions," or by a comparison of these two values on a "transaction-to-transaction" basis.[58] A weighted average normal value may also be compared to "prices of individual export transactions" if there is a significant reason to do so, i.e., if the authorities find a pattern of export prices that differ significantly among different purchasers, regions or time periods, and if an explanation is provided as to why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison."[59]

Anti-dumping rules have been a hotly disputed issue virtually from the inception of a global trading system, and have recently made headlines along with related laws regarding safeguards, subsidies and countervailing duties in recent days with WTO appellate body rulings on U.S. imposition of safeguards against steel and U.S. anti-dumping duties against Canadian softwood lumber.[60] The Doha Declaration contains an explicit directive for the WTO to review anti-dumping rules in its future negotiations.[61] Paragraph 28 of the Doha Declaration directs that the negotiations in this area should be "aimed at clarifying and improving disciplines" while "preserving the basic concepts, principles and effectives of . . . [the Agreements on Implementation of Article

53. I*d*. at 53, 74.

54. Anti-dumping Agreement, *supra* note 19.

55. I*d*. art. 2.1.

56. I*d*. art. 2.6.

57. I*d*. art. 3.1.

58. I*d*. art. 2.4.2.

59. I*d*.

60. S*ee* WTO Dispute Panel Reports on United States – Definitive Measures on Imports of Certain Steel Products WT/DS248/R; WT/DS249/R; WT/DS251/R; WT/DS252/R; WT/DS253/R; WT/DS254/R; WT/DS258/R; WT/DS259/R (July 11, 2003), *available at* http://docsonline.wto.org (via search function) (last visited Apr. 5, 2005).

61. S*ee* Doha Declaration, *supra* note 20, ¶ 28.

VI of the GATT 1994 and on Subsidies and Countervailing Measures] and their instruments and objectives."[62]

While anti-dumping has made it on to the Doha agenda, there is some question as to whether negotiations or any sort of serious reforms will take place, particularly after the collapse of negotiations in Cancún. The concerns raised during the Tokyo Round of WTO negotiations in the early 1990s, that no compromise would be reached between the pro-dumping-law U.S. and the rest of its trading partners, thereby endangering the success of the entire negotiating round, are still very much valid fears today.[63] While fewer anti-dumping investigations were initiated in 2003—during the period from January 1 to June 30, 2003, WTO member countries have initiated 79 anti-dumping investigations, as compared to 149 in the same time period in 2002—the U.S. is still the leading user of anti-dumping rules, having brought 16 investigations thus far.[64] During the second half of the year, from July 1 to December 31, 2003, 115 investigations were initiated, down from 161 the previous year, but India was the leading initiator of anti-dumping suits (33) with the U.S. coming in second with 21 investigations.[65] Support within the U.S. for anti-dumping laws is strong, in part because such a wide range of constituents depends on the laws. As U.S. trade representatives were negotiating in Doha, the House of Representatives passed House Resolution 262, stating that the U.S. Trade Representative's (USTR) negotiations "should preserve the ability of the United States to enforce rigorously its trade laws."[66] The trade promotion authority enacted by Congress in August 2002 explicitly mandates the preservation of anti-dumping laws so "U.S. workers, agricultural producers, and firms can compete fully on fair terms."[67] And, in May of 2001, 62 senators signed a letter instructing the president not to allow negotiations on anti-dumping laws to be part of the Doha agenda.[68] Lawmakers were understandably displeased when anti-dumping did make its way onto the negotiating table. Max Baucus, Democratic Senator from Montana, and then-chairman of the Senate Finance Committee, reinforced the validity of anti-dumping laws to "promote free trade by attacking unfair practices" and expressed his displeasure with the USTR's work: "I understand that this is a very preliminary stage of negotiations and that no agreement is immediately forthcoming. But these laws should not be on the agenda at all . . . I do not accept the position that it was impossible to launch a round without negotiating on trade laws."[69]

62. *Id.*

63. STEWART ET AL., *supra* note 46, at 53 (citing J. F. BESELER & A.N. WILLIAMS, ANTI-DUMPING AND ANTI-SUBSIDY LAW: THE EUROPEAN COMMUNITIES 14 (1986)).

64. Press Release, WTO, WTO Secretariat Reports Significant Decline in New Anti-dumping Investigations, (24 Oct. 2003), *at* http://www.wto.org/english/news_e/pres03_e/pr362_e.htm (last visited Apr. 24, 2005).

65. *Id.*

66. H.R. Con. Res. 262, 107th Cong. (2001) (enacted).

67. Trade Act of 2002, Pub. L. No. 107-210, § 2102(b)(14)(A), 116 Stat. 933 (2002).

68. Public Citizen, *What Really Happened at the* WTO *Qatar Ministerial*: U.S. *Concedes Everything and Gets . . . What?*, *at* http://www.citizen.org/trade/wto/ Qatar/articles.cfm?ID=6531 (last visited Apr. 24, 2005).

69. Bruce Odessey, U.S. Department of State International Information Programs, *Democrats Frustrated at* WTO *Negotiations on* U.S. *Antidumping Law*, (Feb. 6, 2002), *at* http://usinfo.state.gov/ei/Archive/2003/Dec/31-181241.html (last updated Dec. 31, 2003) .

While the U.S., as the principal instigator of anti-dumping investigations is largely opposed to re-formulating the anti-dumping agreement in the WTO, many other parties to the WTO, as well as some constituents in the U.S., support reformation of the WTO rules, often explicitly to force the U.S. to change its methodologies.[70] The so-called "Friends of Anti-dumping," which is composed of Brazil, Colombia, Costa Rica, Hong Kong, China, Israel, Japan, Korea, Mexico, Norway, Chinese Taipei, Singapore, Switzerland, Thailand and Turkey, seek to reform anti-dumping rules so as to "prevent abuse."[71] Many countries see the U.S.'s strong anti-dumping rules as an inappropriate protectionist measure. The WTO, of which the U.S. is one of the most powerful members, forces member countries to open up their trading borders.[72] However, according to Alejandor Jara, Chilean Ambassador to the WTO, these laws are inherently contradictory: "We have been told that we should open our industry and diversify and we have done it, but every time you become successful in a particular sector, it is likely that you will be slapped with anti-dumping duties."[73] At the same time, there is much criticism of the duplicity of U.S. anti-dumping policy: while the U.S. is actively dumping agricultural products on markets throughout the world, it is simultaneously prosecuting other countries (sometimes the very same ones on whose markets the U.S. is dumping agricultural products) for dumping products on the U.S. market.[74]

### C. Anti-dumping Laws in the United States

While an anti-dumping suit may ultimately need to pass WTO scrutiny, it must first be heard in the domestic legal system. Thus, a case involving anti-dumping duties designed to protect domestic fishers would first be heard in U.S. courts. The U.S. anti-dumping system is the subject of much controversy, in part because the U.S. is one of the principal instigators of anti-dumping suits. Anti-dumping legislation in the U.S. dates back to the Anti-dumping Act of 1916, which provided for damages against parties who dumped imported goods on the U.S. market with intent to injure U.S. producers.[75] In 1921, a new anti-dumping act was passed, assigning anti-dumping investigations to the Department of the Treasury.[76] This act also served as the foundation for anti-dumping laws in the GATT, and the U.S. "adopted the revised GATT anti-dumping code in passing the Trade Agreements Act

70. *See, e.g.*, BRINK LINDSEY & DAN IKENSON, CATO INSTITUTE, REFORMING ANTI-DUMPING AGREEMENT: A ROAD MAP FOR WTO NEGOTIATIONS (2002), *available at* http://www.freetrade.org/pubs/pas/tpa-021.pdf (last visited Apr. 24, 2005).

71. International Center for Trade and Sustainable Development (ICTSD), *Rules Negotiating Group Tackles Anti-dumping, Fisheries Subsidies*, 7 BRIDGES 5 (Feb. 12, 2003), *at* http://www.ictsd.org/weekly/03-02-13/story5.htm (last visited Apr. 24, 2005).

72. See the WTO website at www.wto.org.

73. ICTSD, *Rules Negotiating Group Tackles Anti-dumping, Fisheries Subsidies*, *supra* note 71.

74. *See* INSTITUTE FOR AGRICULTURE AND TRADE POLICY (IATP), UNITED STATES DUMPING ON WORLD AGRICULTURAL MARKETS (2003), *available at* http://www.tradeobservatory.org/library.cfm?refID=25825 (last visited Apr. 24, 2005).

75. UNITED STATES INTERNATIONAL TRADE COMMISSION, ANTI-DUMPING AND COUNTERVAILING DUTIES HANDBOOK, at IV-3 (11th ed. Jan. 2005), *available at* http://www.usitc.gov/trade_remedy/731_ad_701_cvd/handbook.pdf (last visited Apr. 6, 2005) [hereinafter USITC ANTI-DUMPING HANDBOOK].

76. *Id.* at IV-4.

of 1979."[77] The most recent changes to U.S. anti-dumping laws came with the adoption of the Uruguay Round Agreements Act (URAA).[78] The Uruguay Round of negotiations created the WTO and mandates that all members must comply with the Agreement on Implementation of Article VI of GATT, and the U.S. adopted this into its own laws in passing the URAA.[79]

U.S. anti-dumping laws and the WTO anti-dumping laws are very similar in structure. Section 1673 of Title 19 of the U.S. code allows for the "imposition of anti-dumping duties" if "a class or kind of foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value" and this sale causes or threatens material injury to a U.S. industry.[80] An anti-dumping investigation is initiated when a petition is filed by domestic producers who "account for at least 25 percent of the total production of the domestic like product" and "account for more than 50 percent of the production of the domestic like product produced by the portion of the industry" filing the petition.[81]

Once an anti-dumping case has been initiated, the investigation proceeds in two simultaneous phases. In one phase, the International Trade Commission (ITC) determines if there is material injury to the domestic industry while, in the other phase, the Department of Commerce ("Commerce") determines whether dumping is occurring.[82] If both findings are affirmative, then dumping is said to be occurring, and anti-dumping duties can be assigned.[83] Both determinations are based on data collected from questionnaires sent to domestic producers, foreign producers, and importers.[84] While neither agency has the authority to force foreign producers to respond, in the absence of such responses, the agencies use "other factors available,"[85] which is oftentimes the data supplied in the anti-dumping petition by the domestic industry, data which will almost certainly be unfavorable to the foreign producer.[86]

In making its determination, Commerce determines a "class" of products to be investigated, and from there determines a "like product" which may be a more narrow subset of products than the specified class.[87] A "class" of products to be investigated is based on a five-prong test. Commerce looks at: "(1) The general characteristics of the merchandise; (2) The expectations of the ultimate purchaser; (3) The channel of trade in which the products are sold; (4) The ultimate use of the merchandise; and, (5) The manner in which the products are advertised and displayed."[88] As enumerated in section

77. I*d*.

78. I*d*.

79. I*d*.

80. 19 U.S.C. § 1673 (1)-(2) (2003).

81. I*d*. § 1673(c)(4)(A)(i-ii).

82. IMPORT ADMINISTRATION, UNITED STATES DEPARTMENT OF COMMERCE, IMPORT ADMINISTRATION ANTIDUMPING MANUAL, Intro., at 6-7 (January 22, 1998), *available at* http://ia.ita.doc.gov/admanual/index.html (last updated Oct. 14, 2004) [hereinafter DOC ANTIDUMPING MANUAL].

83. I*d*., Intro., at 7.

84. I*d*.

85. I*d*., Intro., at 8.

86. STEELE, supra note 50, at 264.

87. DOC ANTIDUMPING MANUAL, *supra* note 82, Chapter 1, at 16.

88. I*d*., Chapter 1, at 13-14.

1677(10), a "'domestic like product' means a product which is like, or in the absence of like, most similar in characteristics and uses with, the article subject to an investigation under this subtitle."[89]

Application of the "like product" standard focuses on the uses and functions of a product as much as its physical characteristics. For example, in a recent anti-dumping investigation against Vietnamese catfish, Vietnamese *basa* and *tra*, which are biologically different species than American catfish, were considered a "like product" because they were used as a substitute for catfish by American restaurants, were often times marketed or sold as catfish, and were packaged in similar manners and quantities.[90] The "like product" in the domestic market, however, only consisted of farmed U.S. catfish, as most responding purchasers of catfish indicated that "'wild' catfish are not substitutable for the imported subject product from Vietnam or farm-raised catfish."[91] In a case against Norwegian salmon, however, Pacific salmon and wild salmon were not considered a "like product" to Atlantic farmed salmon from Norway because they differed in terms of physical characteristics, uses, distribution channels, and production processes.[92] Evidence that consumers viewed some Pacific salmon as interchangeable with Atlantic salmon was not enough to include it in the "like product" comparison.[93] In a recent shrimp anti-dumping case, however, wild and farmed shrimp were classified as like products.[94] In its preliminary finding, Commerce noted that "whether shrimp is farm-raised or wild-caught is not a physical characteristic of the shrimp, but rather a method of harvesting. Therefore, we have not accepted the additional species classifications proposed by the respondents."[95]

While the U.S. anti-dumping laws may look relatively innocuous on their face, the manner in which calculations of "dumping margins" are made, and thus determinations about whether dumping is occurring, are the subject of much controversy. A dumping determination is based on a comparison of the price a foreign producer charges for a product on the U.S. market (the export price or constructed export price) to the price they charge for that same product in their home country (the normal value, based on home market, third country, or constructed value).[96]

89. 19 U.S.C.S. § 1677(10) (2003).

90. Certain Frozen Fish Fillets from Vietnam, USITC Pub. 3617, Inv. No. 731-TA-1012 (Final), at Views of the Commisssion, Section I.C (Domestic Like Product) (Aug. 2003), *at* 2003 WL 21980351 (U.S.I.T.C.).

91. I*d*. at Part II (Conditions of Competition in the US Market), subsection titled*Wild or Commercially Harvested Catfish*.

92. Fresh and Chilled Atlantic Salmon from Norway, USITC Pub. 2272, Inv. No. 701-TA-454 and 731-TA-454 (Preliminary), at Views of the Commission, Section I.A (Atlantic versus Pacific Salmon) (Apr. 1990), *at* 1990 WL 710838 (U.S.I.T.C.).

93. See ITC Commissioner Ronald Cass' additional views: "I do not believe that the record evidence on the like product issue is so clear-cut as to preclude the possibility that the Commission might decide in a final investigation to define the like product more broadly." I*d*. at Additional Views of Vice-Chairman Ronald A. Cass, Section I (Domestic Like Product and Domestic Industry).

94. Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Certain Frozen and Canned Warmwater Shrimp From Brazil, 69 Fed. Reg. 47,081, 47,085 (Aug. 4, 2004).

95. I*d*.

96. DOC ANTIDUMPING MANUAL, *supra* note 82, Chapter 6, at 4.

The "dumping margin" is "the difference between a company's U.S. sales price and the comparison market price or cost," which is often expressed as a percentage of the U.S. sales price.[97] Dumping "duties" are set at the amount of the dumping margin.[98] Because products and trade patterns are often not identical in the home market and the U.S. market, in making the price comparison, Commerce adjusts the normal value based on "verified differences in physical characteristics, quantities sold, levels of trade, circumstances of sale, applicable taxes and duties, and packing and delivery costs."[99] Normally, Commerce compares weighted average export prices to weighted average normal values, but under specific circumstances compares a weighted average to an individual transaction price, or individual transaction prices to each other.[100]

This process of determining the weighted average is the source of much of the criticism of U.S. anti-dumping law. The practice of "zeroing" is one such root of contention: Brink Lindsey and Dan Ikenson of the CATO Institute call it "one of the most notorious distortions in current anti-dumping methodology."[101] The practice is so egregious, say Lindsey and Ikenson, that zeroing can "create dumping margins out of thin air."[102] The "cost test" is another source of criticism of U.S. anti-dumping law. The "cost test" refers to the practice in which, in determining normal value, all instances in which the product is sold in the home country at less than the cost of production are discarded.[103] Thus, in the dumping determination, all export prices are compared to only the highest home country prices, "skew[ing] the calculation in favor of finding dumping."[104] These and the majority of other criticisms are aimed primarily at the perception that the methodology used in U.S. anti-dumping is fundamentally biased towards finding dumping. In this argument, current anti-dumping rules do not serve to protect U.S. industry from unfair competition, but instead punish foreign companies for what would otherwise simply be good business practice.[105] Data from the ITC, however, tells a slightly different story. According to the ITC, for the time period 1980-2001, 42 percent of anti-dumping cases resulted in an affirmative finding of

97. I*d*., Intro., at 6.

98. I*d*.

99. I*d*., Chapter 6, at 5.

100. I*d*., Chapter 6, at 6-7.

101. LINDSEY & IKENSON, REFORMING THE ANTI-DUMPING AGREEMENT, *supra* note 70, at 19.

102. I*d*. Essentially, in making the dumping margin calculations, any time the export price is higher than the normal value, the dumping margin is a positive number and is used in the aggregation as its true value. Any time the export price is lower than normal value, the dumping margin is a negative number. Instead of using this negative number in the aggregation, Commerce sets all negative dumping margins as zeros, thereby ensuring a higher dumping margin. The EC uses the same practice, and in a recent case between India and the EC over anti-dumping duties on import of bed linen, the WTO appellate body upheld the panel's ruling that "'the practice of 'zeroing' when establishing 'the existence of margins of dumping', as applied by the European Communities in the anti-dumping investigation at issue' is inconsistent with Article 2.4.2 of the A*nti-Dumping Agreement*." WTO Appellate Body Report on European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India, WT/DS141/AB/RW, at 1-2 (April 8, 2003), *available at* http://dosconline.wto.org (via search function) (last visited Apr. 6, 2005). In response, the EU has only slightly modified its practices, and the U.S. has not changed its practices at all. LINDSEY & IKENSON, REFORMING THE ANTI-DUMPING AGREEMENT, *supra* note 70, at 20.

103. I*d*. at 14.

104. I*d*.

105. I*d*. at 3.

dumping, 38.3 percent in a negative finding, and 19.7 percent were terminated.[106] When results were analyzed in terms of import value, 54.4 percent resulted in an affirmative finding, 32.5 percent in a negative finding, and 13.1 percent were terminated.[107] While both sets of statistics show more affirmative findings than negative, they do not reveal the overwhelming majority of affirmative findings that would suggest the fundamentally biased system critics make the US system out to be.

Regardless of the outcome of a suit, however, the mere threat of an anti-dumping suit can cause a significant impact on imports. Because anti-dumping suits require an extensive amount of time—generally at least a year—to litigate, and require extensive expertise and personnel to both respond to questionnaires and defend the case, oftentimes the mere threat of an anti-dumping suit is enough to cause a country to withdraw its imports.[108] This threat is particularly deadly to developing countries, which are simultaneously least able to commit the technical, professional and monetary resources to defend a suit and most eager to expand their exports.

## IV. Can Anti-dumping Laws Be Successfully Applied to Wild-capture Fisheries?

The fisheries sector is no stranger to anti-dumping laws—a number of anti-dumping cases have been brought by U.S. seafood industries against importers of fish products in the past few years. An anti-dumping case against Norwegian farmed Atlantic salmon in 1991 resulted in an average dumping margin applied to Norwegian farmed salmon imports of 26 percent, which effectively eliminated Norwegian farmed salmon from the U.S. market.[109] An anti-dumping case brought against Chilean farmed Atlantic salmon in 1996 put a 4.57 percent anti-dumping duty on the Chilean product.[110] The anti-dumping order was revoked in the summer of 2003, without protest from American fish farmers, who had almost all been bought out by foreign corporations.[111] Most recently, an anti-dumping duty was placed on Vietnamese *basa* and *tra*, which are marketed in the U.S. as catfish.[112]

Until this year, however, all of these cases have involved farmed fish, not wild fish stocks. Although not exactly analogous, these cases are still useful in analyzing the applicability of anti-dumping rules to wild-capture fisheries. A more useful precedent may be available from a case currently pending in the Department of Commerce. Brought by shrimpers from the southern U.S. against China, Brazil, Ecuador, India, Thailand, and Vietnam, the case pits pond-raised imports against a wild-caught domestic product.[113] The case is awaiting a final determination, but

106. USITC ANTI-DUMPING HANDBOOK, *supra* note 75, at E-10.

107. *Id.*

108. ICTSD, *Rules Negotiating Group Tackles Anti-dumping, Fisheries Subsidies*, *supra* note 71.

109. INTRAFISH, ATLANTIC SALMON MARKET IN THE US - ANTIDUMPING PROCEDURES AGAINST CHILEAN SALMON LINGERING, at link for "The U.S. countervailing and anti-dumping strategy," *at* http://www.intrafish.com/intrafish-analysis/ASUS_1999_41_eng/index.php3 (last visited Apr. 24, 2005).

110. *Id.*

111. Michael Milstein, *A Tale of Boom and Bust*, THE OREGONIAN, Dec. 21, 2003, at A1.

112. *See* Certain Frozen Fish Fillets from Vietnam, *supra* note 90, at Views of the Commission.

113. Press Release, International Trade Commission, ITC Votes to Continue Cases on Certain Frozen and Canned Warmwater Shrimp and Prawns from Brazil, China, Ecuador, India, Thailand and Vietnam (Feb. 17, 2004) (on file with author).

the preliminary findings have found both material injury to the domestic industry and that dumping is occurring, using wild and farm-raised shrimp as like products.[114] These findings provide valuable guidance in assessing the usefulness of anti-dumping laws in protecting wild-capture fisheries.

Only one of these fisheries anti-dumping cases has made its way to the international level. The Norwegian salmon case was heard by a GATT panel at Norway's request: Norway claimed that the U.S.'s imposition of a countervailing duty was "inconsistent with the obligations of the United States under the Agreement [GATT]."[115] The panel report was not adopted by the GATT body, since under GATT, unanimous approval was necessary for the adoption of a panel report,[116] but the ruling held that the U.S. did not violate its obligations under the Agreement on Anti-dumping.[117] The Norway salmon anti-dumping suit also proved successful in impacting imports: after the ruling, Norwegian imports to the U.S. dropped from 9,450 tons in 1990 to 1,320 tons in 1991.[118]

While all of these cases have pitted farmed fish imports against domestic farmed products, using anti-dumping laws to assist traditional fishers in maintaining their livelihoods will bring wild fish products against farmed fish products. While there is ample evidence of the environmental and social problems associated with aquaculture, a comparison with wild-caught fish is not always an easy one, since, as discussed above, many fishing methods are also environmentally destructive, and a comparative evaluation of the environmental harms, although possible, is at times quite difficult. The Alaskan salmon industry, which is the only Marine Stewardship Council (MSC)-certified salmon fishery in the world (for what MSC certification is worth)[119] is highly regarded for its sustainability, and

114. Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Certain Frozen and Canned Warmwater Shrimp From Brazil, 69 Fed. Reg. at 47,085.

115. United States – Imposition of Countervailing Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway, 1992 WL 792950 (G.A.T.T.), at *4 (Dec. 4, 1992).

116. Note that because the GATT DSU was structured so as to require unanimous approval, panel reports were rarely adopted since few countries would willingly (or could politically) assess dumping duties on their own industry.

117. United States – Imposition of Countervailing Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway, 1992 WL 792950 (G.A.T.T.), at *110-111.

118. MICHAEL L. WEBER, FARMING SALMON: A BRIEFING BOOK, *supra* note 42.

119. *See* Marine Stewardship Council, *Alaska Salmon*, *at* www.msc.org (click on "MSC Consumer Site" and then on "Fisheries") (last visited Apr. 5, 2005) [hereinafter MSC *Alaska Salmon*]. Note that there is ongoing debate in the environmental community over whether MSC certification is actually a mark of sustainability. This is particularly true in light of the recent MSC decision to certify the Alaska pollock industry, which is by most accounts far from sustainable as a trawl fishery and a huge contributor to forage competition for the endangered Stellar Sea Lion and the depleted Northern fur seal. *See* Mary Pemberton, *Groups Dispute Pollock Eco-Label Certification*/Fisheries: Environmentalists File objections, cite population declines, ANCHORAGE DAILY NEWS, Aug. 26, 2004, at F1, *available at* LEXIS, Location: News/By Individual Publication/A, ANCHDN File. See also Alaska Oceans Program, *Marine Stewardship Council Watchdog*, *at* http://www.alaskaoceans.org/about-us/msc.htm (last visited Apr. 5, 2005) for general criticisms of the MSC.

offers fairly clear environmental advantages over aquaculture.[120] Therefore, I will use the Alaskan salmon industry as a case study to examine the applicability of anti-dumping laws to traditional fisheries.

## A. Case Study: Alaska Salmon

### 1. Background

Salmon have an almost mystical status throughout the Northwest.[121] Anadromous fish, they emerge from their eggs in freshwater rivers and streams, journey hundreds of miles to the ocean, spend several years in the ocean, and then return to the stream or river of their birth to spawn. The journey alone is awe-inspiring, and the sight of these tremendous fish as they battle their way upstream even more so. Aside from their poetic qualities and cultural significance, salmon have also served as an important protein source for native people for millennia. In many isolated areas, salmon serves as a primary source of income,[122] and in Alaska, "[s]ince the late 1800s, wild salmon capture has played a critical role in the region's economy by providing employment and income to a large number of Native American and non-native communities along the coast."[123]

Because their life cycles cover such a huge range of territory and require open rivers and oceans for a successful migration, dam construction, deforestation, and urbanization in recent decades have adversely affected salmon stocks worldwide.[124] According to the Institute for Fisheries Resources, the research arm of the Pacific Coast Federation of Fishermen's Associations, "[d]ecades of over-logging of old growth forests, overgrazing, over-appropriation of water, water pollution and the deliberate blockage of fish migration routes have resulted in the widespread destruction and blockage of critical spawning and rearing habitat."[125] Indeed, of the six species of Pacific salmon,[126] some runs of three of the six species are listed as endangered under the Endangered Species Act and runs of five of the six are listed as threatened.[127] All runs of Atlantic salmon (*salmo salar*) are listed as endangered in the U.S., and no wild Atlantic salmon is harvestable in the U.S. today as a food product.[128]

120. *See* Monterey Bay Aquarium, *Seafood Watch: Seafood Guide-Salmon* (rating wild-caught Alaska salmon as a "best choice" for environmentally-friendly seafood and recommending to readers to look for the MSC label when buying salmon), *at* http://www.mbayaq.org/cr/cr_seafoodwatch/sfw_factsheet.aspx?fid=27 (last visited Apr. 5, 2005).

121. As anyone who has lived in the Northwest will note, footnoting this sentence borders on the ridiculous, but for the legal sticklers among you, *See* Bruce P. Finney et al. *Fisheries Productivity in the Northeastern Pacific Ocean Over the Past 2,200 years*, 416 NATURE 729, 729 (2002) ("Salmon are important ecological, economic, and cultural resources in the northern Pacific region . . . .").

122. Naylor et al., *supra* note 5, at 25.

123. *Id.* at 19.

124. OCEANA, OCEAN THREATS: FARMED SALMON, *supra* note 24.

125. Institute for Fisheries Resources, *The Pacific Salmon Restoration Program*, *at* http://www.ifrfish.org/programs/salmon.html (last visited Apr. 24, 2005).

126. Sockeye salmon, *oncorhynchus nerka*; Chinook (King) salmon, *oncorhynchus tshawutscha*; Chum (Dog) salmon, *oncorhynchus keta*; Coho (silver) salmon, *oncorhynchus kisutch*; Pink (humpback) salmon; *oncorhynchus gorbuscha*; and steelhead trout.

127. *See* Northwest Region, National Marine Fisheries Services, *Endangered Species Act Status Reviews and Listing Information*, *at* http://www.nwr.noaa.gov/1salmon/salmesa/ (last updated Oct. 21, 2004).

128. *See* Downeast Salmon Federation, *Endangered Atlantic Salmon*, *at* http://www.maine-salmonrivers.org/cgi-bin/webdata_pro.pl?_cgifunction=search&_layout=dsfpage&dsfpage.sitesection=Endangered_Atlantic_Salmon (last visited Apr. 26, 2005).

The tear-invoking state of the salmon fishery exists despite a number of domestically available legal protections. In addition to federal protection under the Endangered Species Act, salmon fisheries are managed by the state in Alaska, and by the Magnuson-Stevens Act Pacific Fisheries Management Council in the rest of the Pacific.[129] Salmon stocks are also protected in theory through the reach of international agreements such as the UN Agreement on Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (the UN Fish Stocks Agreement), part of the UN Convention on the Law of the Sea.[130] The convention applies primarily to fish stocks in areas beyond national jurisdiction, but its general conservation goals apply to fish stocks within national boundaries as well, due to the migratory nature of the fish involved.[131] The Fish Stocks Agreement is precaution-based, and its aim is to "adopt measures to ensure long term sustainability of straddling fish stocks[132] and highly migratory fish stocks."[133] The U.S., although not a signatory to the UN Convention on the Law of the Sea, has ratified the Fish Stocks Agreement.[134] The U.S.-Canada Pacific Salmon treaty also governs Pacific salmon stocks.[135]

While these protections have not served to protect Pacific salmon runs in the lower 48 (due in part to the combined effects of dams, deforestation, urbanization, and other habitat degradation), Alaskan salmon runs have been largely immune to these effects,[136] although they are supplemented heavily with hatchery fish.[137] Thousands of people journey to

129. North Pacific Fishery Management Council, *About the Council*, *at* http://www.fakr.noaa.gov/npfmc/about.htm (last visited Apr. 24, 2005); The Pacific Fishery Management Council, *Fisheries Management—Background: Salmon*, *at* http://www.pcouncil.org/salmon/salback.html (last updated Apr. 30, 2003); Magnuson-Stevens Act, 16 U.S.C. § 1823 (2003).

130. *United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks: Agreement for the Implementation of the Provisions of the United Nations Law of the Sea of 10 December 1982, Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks*, U.N. Doc. A/CONF.164/37 (1995), Article 3, available in 34 I.L.M. 1542 [hereinafter UN *Fish Stocks Agreement*].

131. *Id.*

132. "'Straddling stocks' refers to a wide category of fish species that to varying degrees overlap the boundary between the 200-mile limit of an EEZ and the adjacent high seas. 'Highly migratory fish stocks' refers to species that range over vast areas of the oceans, which may or may not include the EEZs of coastal states." Alison Rieser, *Reports Of* ASIL *Program: ASIL Observer Comments On UN Conference On Straddling And Migratory Fish Stocks*, AMERICAN SOCIETY OF INTERNATIONAL LAW NEWSLETTER, November, 1993, *available at* LEXIS, Location: Area of Law - By Topic/E-Commerce/Treaties & International Agreements, ASIL File.

133. UN Fish Stocks Agreement, *supra* note 130, Art. 5.

134. Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, United Nations, *Chronological lists of ratifications of, accessions and successions to the Convention and the related Agreements as at* 01 *February* 2005, *at* http://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm# (last updated Feb. 1, 2005). Agreement for the implementation of the provisions of the Convention relating to the conservation and management of straddling fish stocks and highly migratory fish stocks.

135. Pacific Salmon Treaty, Jan. 28, 1985, U.S.-Can., T.I.A.S. No. 11091.

136. Helen Jung, *Endangered Fishermen Changing Markets and Outdated Management Might Doom Alaska's Salmon Industry*, ALASKA, Aug. 2002, at 24.

137. *See* Alaska Department of Fish & Game-Division of Commercial Fisheries, *Statewide Salmon Enhancement and Hatcheries*, *at* http://www.cf.adfg.state.ak.us/geninfo/enhance/enhance.php (last visited Apr. 5, 2005).

Alaska every summer to see the once-common sight of bears pulling salmon out of the water and waterfalls glimmering extra silver because of the fish leaping up through the pools. What has changed in recent years, however, is the price fishers receive for their product. In the period from 1988-2000, prices (adjusted for inflation) dropped from 70 percent for King salmon to 95 percent for pink salmon.[138] And, because Alaska's economy is so dependent on the salmon industry, these impacts have been felt throughout the state. Fishing for salmon in Alaska requires a salmon fishing permit.[139] In 1990, the 12,084 permits were valued at $1.247 billion collectively.[140] In 2002, the 11,421 valid permits were estimated to be valued at $204 million.[141] The permits are "equivalent to retirement accounts" and their decline in value, along with correlative declines in the value of boats, fishing gear, and other assets, "will continue to reverberate throughout the Alaska economy in coming years."[142] Lower permit values are symptomatic of lower prices for the fish you can catch with them. And these lowered fish prices have forced many permit holders to stop fishing altogether: from 1990 to 2001, 37 percent fewer permit holders fished for salmon.[143] Thirty-seven percent fewer boats means proportionally fewer jobs for crew members, and thus even fewer jobs for coastal economies (which lose customers).[144] Overall, one of every ten employed Alaskans works in an industry associated with salmon fishing, and the industry provides "annual income to individuals of more than $1 billion."[145]

The drop in salmon price, most agree, is due to the huge increase in imports of farmed salmon, primarily from Chile and Canada, each of which represents 47 percent of farmed salmon imports to the U.S., by value.[146] Globally, salmon aquaculture has increased by a factor of five since the late 1980s.[147] In 2002, aquaculture "accounted for over 60 percent of the global supply of salmon."[148]

### 2. Likelihood of Success In Bringing Anti-Dumping Suits

While there is little doubt at this point that the downturn in the Alaska salmon industry is largely due to the tremendous influx of imported farmed salmon, primarily from Chile and Canada, whether there is dumping occurring is another matter entirely. An affirmative dumping finding requires not only a mere increase in imports, but requires that these imports are being sold at a cost lower than the production cost.[149] A suit against Canada or

138. Gilbertsen, *supra* note 37, at 4.

139. ALASKA STAT. § 16.43.140 (Michie 2004).

140. Gilbertsen, *supra* note 37, at 5.

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. Naylor et al., *supra* note 5, at 26. Note however, that as this article goes to press, prices for wild Alaska salmon are increasing dramatically. *See* Margaret Bauman, *Economist: 'Things Are Looking Up,'* AP ALERT - ALASKA, Oct. 23, 2004, *at* Westlaw (identifier: 10/23/04 AP Alert - AK 04:04:56). While this specific case study thus may no longer hold true, the basic analysis remains the same and can be applied to other wild-capture fisheries.

146. Gilbertsen, *supra* note 37, at 10.

147. Naylor et al., *supra* note 5, at 19.

148. Gilbertsen, *supra* note 37, at 8-9.

149. Note that while there is almost no "home consumption" of Chilean farmed salmon, U.S. anti-dumping laws allow that in the absence of a true home consumption price, a constructed value, based on a comparable market can be used. *See, e.g.*, Notice of Preliminary Determination of Sales at

Chile also involves political challenges: Canada is a fellow member of NAFTA, and the U.S. recently negotiated a bi-lateral trade agreement with Chile which went into effect January 1, 2004.[150]

Given past successes in anti-dumping cases in the U.S., the Alaska salmon industry has a good chance of winning an anti-dumping case. There might, however, be some barriers to overcome. Key questions will be timing, and, as always in trade cases, the "like product" determination. First, defining the "period of investigation" will be critical to the success of an anti-dumping case. Because prices fluctuate over time, the case for dumping depends on what time period is investigated. The Alaska salmon industry is currently at a low point, but Alaskan salmon fishermen would want to use the high point of prices as a point of comparison because comparing the incredibly low 2002 wild salmon prices would not result in a dumping finding. The high point value is the more accurate price for evaluating dumping anyway because, at that point, the impact of the influx of farmed salmon had not yet been felt on the market.

Second, the "like product" determination is also a crucial component of this anti-dumping investigation. For the Alaska salmon anti-dumping case to be successful, wild caught salmon and farmed salmon will have to be considered "like products" for the purpose of the investigation. There is some precedent for comparing farmed and wild-fish products—this was at issue in anti-dumping cases involving Norwegian salmon, Chilean salmon, and shrimp from Central America and Asia.[151]

One key issue in comparing farmed and wild salmon will be the physical differences between the two types of salmon. In the Norway case, the ITC's investigation concluded that Atlantic salmon differed from Pacific salmon because it is "lighter in color, has a milder flavor, and longer shelflife."[152] Therefore, the two were not "like products." This might not entirely preclude a successful anti-dumping case against Chilean farmed salmon since Chilean producers do farm some Chinook salmon, which could be compared on a product-to-product basis, and would seemingly be more equal in physical characteristics, but farmed Chinook is a very small segment of the Chilean salmon produced. If anything, in terms of physical characteristics, wild and farmed fish might not be considered "like" largely because the wild fish, raised without antibiotics and possessing a natural, rather than dyed color, may simply be a better product.

The methods of distribution analysis provides another barrier to a "like product" comparison. In the anti-dumping case brought against Chile in 1999, comparing farmed Atlantic salmon from Chile

Less Than Fair Value and Postponement of Final Determination: Fresh Atlantic Salmon From Chile, 63 Fed. Reg. 2664, 2667-78 (Jan. 16, 1998).

150. United States-Chile Free Trade Agreement Implementation Act, Pub. L. No. 108-77, § 101, 117 Stat. 909, 911, (2003) (19 U.S.C. § 3805 note).

151. See United States - Imposition of Countervailing Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway, 1992 WL 792950 (G.A.T.T.); Fresh Atlantic Salmon from Chile (Views on Remand), USITC Pub. 3244, Inv. No. 731-TA-768 (Remand)(October 1999), at 1999 WL 1124766 (U.S.I.T.C.); Certain Frozen Fish Fillets from Vietnam, *supra* note 90.

152. Fresh and Chilled Atlantic Salmon from Norway, *supra* note 92, at Views of the Commission, Section I.A.1 (Physical Characteristics).

to farmed Atlantic salmon from the U.S., U.S. producers argued that all fresh-farmed salmon products constituted like products.[153] Chilean producers argued unsuccessfully that their products, which included pinbone-out fillets, were filling markets previously untapped by U.S. producers, and therefore Chilean products did not constitute a like product.[154] Following this precedent, farmed salmon producers would most likely be unsuccessful in arguing that their product is likewise filling a market gap. However, in the Norway case, the ITC held that because the Norwegian product was sold fresh and the majority of the wild product was sold frozen, the two utilized different distribution channels and were therefore not alike.[155] Where this distinction is true of Chilean salmon this precedent could make the two salmon products "unlike."

The recent shrimp decision, however, offers much more hope for a successful like product determination. In this decision the ITC did not find the wild/farmed distinction relevant because it is a method of harvesting, not the actual product.[156] Since many of the same distinctions between wild and farmed shrimp in terms of physical characteristics, uses, seasonal availability, consistent products and distribution channels are the same as for salmon, the shrimp decision offers a valuable precedent for a successful anti-dumping suit comparing wild and farmed salmon.

Product interchangeability and customers' perceptions may be the most convincing argument for finding that farmed and wild fish are "like products." In the Norway case, the ITC examined interchangeability, customers' perceptions, and price of the products. They found that while there is some substitutability between products, it is limited.[157] However, ITC Commissioner Ronald Cass argued in the ITC opinion that there is evidence that consumers may view the two products as interchangeable.[158] The evidence, he said, was not "so clear cut to preclude the possibility that the commission might decide to define like product more broadly."[159] The case for this sort of substitutability may be even stronger today—the ultimate consumer often cannot distinguish (or doesn't even know the difference) between farmed and wild salmon, and the products often look identical to the consumer at the grocery store.[160] According to a recent *New York Times* investigation, fish markets can not even tell the difference—in a test of salmon sold as "wild" in eight New York

153. Fresh Atlantic Salmon from Chile, USITC Pub. 3052, Inv. Nos. 701-TA-372 and 731-TA-768 (Preliminary), Views of the Commission, Section I.C (Domestic Like Product in These Investigations) (Aug. 1997), at 1997 WL 817801 (U.S.I.T.C.).

154. *Id*. at Views of the Commission, Section I.C.2 (Interchangeability; Producer and Customer Perceptions).

155. *Id*. at Fresh and Chilled Atlantic Salmon from Norway, *supra* note 92, at Views of the Commission, Section I.A.2 (Uses, distribution channels).

156. *See* Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Certain Frozen and Canned Warmwater Shrimp From Brazil, 69 Fed. Reg. at 47,085.

157. Fresh and Chilled Atlantic Salmon from Norway, *supra* note 92, at Views of the Commission, Section I.A.4 (Interchangeability, customers' perceptions, and price.).

158. *Id*. at Additional Views Of Vice Chairman Ronald A. Cass, Section I (Domestic Like Product and Domestic Industry).

159. *Id*.

160. DOC ANTIDUMPING MANUAL, *supra* note 82, Chapter 1, at 13-14.

City stores, salmon at six of the eight was actually farmed according to lab tests.[161]

Finally, while there is an extensive debate in the WTO context over whether process and production methods (PPMs) can be considered in assessing a product (this is an issue particularly in terms of labeling), thus far the WTO has held that environmentally and socially destructive processes cannot be considered in distinguishing one product from another; rather, only the physical characteristics of the product itself can be so used.[162] While this rule does not generally serve environmentalists' purposes, here the PPM argument may actually cut in favor of a like product determination for Alaska salmon.

However, the like product argument also faces several not insignificant hurdles. For one, current marketing campaigns and activism for Alaska salmon focus on distinguishing the wild product from the farmed.[163] New studies seem to be appearing virtually every day showing that farmed salmon contains more harmful chemicals or less healthy fats.[164] A case attempting to show the similarities between farmed and wild products would seem to work at odds with these efforts and may, in the long run, prove even more damaging to the wild salmon market. Moreover, farm raised and wild salmon have different customs codes, a fairly significant indicator that they are considered to be distinct and different products.[165] Also, the Country of Original Labeling legislation which was part of the 2002 Farm Bill mandates that food products be labeled by country of origin and also provides for labeling of fish products specifically as farmed or wild.[166]

Additionally, farm-raised salmon has in part been so successful in rapidly taking over a huge market share precisely because the aquaculture industry does produce a different product. Aquaculture "can produce a consistent quality of salmon—specified to order by size and cut—at any time during the year."[167] Aquaculturists do not have to depend on the timing of fish runs, are not at the mercy of weather patterns, and have complete control over their products, even so far as hand-picking the shade of dye to use to give their salmon that perfect pink color.[168] In today's atmosphere of large conglomerate food chains, this pre-

161. Marian Burros, *Stores Say Wild Salmon, but Tests Say Farm Bred*, NEW YORK TIMES, Apr. 10, 2005, at 1.

162. *See* GATT Panel Report on United States - Restrictions on Imports of Tuna, DS21/R - 39S/155 (Sept. 3, 1991), *available at* 1991 WL 771248 (G.A.T.T.); GATT Panel Report on United States - Restrictions on Imports of Tuna, DS29/R (June 16, 1994), *available at* 1994 WL 907620 (G.A.T.T.).

163. Charlie Ess, *Swimming Upstream*, NATIONAL FISHERMAN, Dec. 2002, at 30. *See generally* Alaska Seafood Marketing Institute, *Alaska Seafood*, *at* www.alaskaseafood.org (last visited Apr. 5, 2005).

164. *See* Ronald A. Hites et al., *Global Assessment of Organic Contaminants in Farmed Salmon*. SCIENCE, Jan. 9, 2004, at 226 (finding that farmed salmon contains up to 10 times as many PCBs, which cause cancer, as does wild salmon). Also, according to USDA data, farmed Atlantic salmon contain 70 percent more fat than wild Atlantic salmon and 200 percent more fat than wild Pacific pink and chum salmon.

165. *See* Harmonized Tariff Schedule of the U.S., USITC Pub. 3745 (2005), at heading 0302.12.00 (Pacific salmon, Atlantic salmon, and Danube salmon), *available at* http://www.usitc.gov/tata/hts/bychapter/index.htm (last visited Apr. 7, 2005).

166. *See* Country Of Origin Labeling For Fish And Shellfish, 7 C.F.R. pt. 60 *et. seq.* (2005).

167. Naylor et al., *supra* note 5, at 24.

168. *Id.* at 22, 24-26; Eagle et al., *supra* note 10, at 5.

dictability is even more advantageous: "Supermarket chains and superdiscounters, such as Price Club, Walmart, Costco, and Safeway, demand aesthetically pleasing, easy-to-prepare, repeatable products."[169] To some distributors then, farmed and wild salmon are not "like products" because farmed salmon is a more easily homogenized good. Since the farmed salmon is more suited to their needs, these distributors would most likely argue against a "like product" determination in order to maintain cheap access to the homogenized product. Once again, however, the same arguments can be made for farmed vs. wild shrimp, and yet did not convince the ITC in their recent decision.

### 3. Other Considerations in Bringing an Anti-Dumping Suit

Assuming *arguendo* that Alaska salmon fishers were able to win an anti-dumping suit, one must ask if winning such a suit would help improve the economic situation for Alaskan fishers and help mitigate the environmental impacts of aquaculture. It would seem the answer is yes, at least in the short-term, since victory in an anti-dumping suit means an anti-dumping duty would be imposed, raising the price of farmed imports and perhaps cutting back farmed salmon production in Chile. After the Coalition for Fair Atlantic Salmon Trade won an anti-dumping case against Norwegian farmed salmon imports, Norway virtually disappeared from the U.S. farmed salmon import business.[170] However, as is apparent from the current state of the global farmed-salmon industry, other countries quickly stepped in to fill the gap left by Norwegian importers. A ruling against Chilean or Canadian farmed salmon could have the same effect, relieving the industry for a year or two, only to be replaced by competition from another area of the world. This result would not really help the Alaska salmon industry, nor would it do much to eliminate or reduce salmon farming and its harmful environmental practices. Moreover, given the current trade atmosphere, there is a substantial risk that a request for a panel review in the WTO of such a dumping finding could result in the overturning of the U.S. finding, much as happened recently in the steel safeguards case.[171]

While an anti-dumping suit could offer a temporary fix or a "band-aid" type solution, other legal avenues may provide more effective long-term remedies by addressing the core of the problem. One avenue would be to focus on the environmental harms associated with salmon farming and reduce this type of fish production using international treaties such as the UN Fish Stocks Agreement and domestic laws such as the Magnuson-Stevens Act, or at least raise public awareness of the risks associated with it. Aquaculture is illegal in some areas, Alaska for instance, and increased regulation in this manner is possible. Another avenue would be to work further on marketing campaigns. The Alaska wild salmon industry is the only Marine Stewardship Council (MSC)-certified

169. Naylor et al., *supra* note 5, at 25.

170. WEBER, *supra* note 42.

171. Because the U.S. is a member of the WTO, an anti-dumping ruling must comply with WTO anti-dumping laws as well as those of the U.S. Thus, Chile may be able to claim that the imposition of a dumping duty (or the determination that dumping is occurring) is in violation of WTO laws. *See generally* WTO Dispute Panel Reports on United States - Definitive Measures on Imports of Certain Steel Products, *supra* note 60.

salmon fishery in the world.[172] While there is ongoing debate about the accuracy of the MSC label, a marketing campaign using this (or another) label highlighting the special nature of the Alaska product and the inferiority of farmed fish and aquaculture as a method of production may provide a better long-term solution. Unfortunately, a labeling scheme may violate WTO rules as well. Ecolabeling has been on the WTO's radar screen since the infamous Tuna-Dolphin case,[173] and is on the Doha agenda as well.[174] However, since WTO rules allow for labeling discrimination only on the basis of physical product characteristics, and not on the basis of production methods, allowing a consumer to choose between a farmed and wild product, in fact, may not be legal under WTO rules. Finally, restructuring the salmon industry itself and the way fishing is done could also provide relief to commercial salmon fishers, but would do little towards stopping unsustainable aquaculture.[175]

## V. Conclusion

While anti-dumping measures may not provide **the** answer for Alaska salmon, or other traditional fisheries worldwide, they do provide one of the only tools left to fight the rising tide of economic globalization. While other legal regimes make it increasingly harder for people, the environment, and human rights to compete with large corporations, anti-dumping laws may offer at least a temporary respite for these values. While there is certainly some question as to how these laws fit in with the overall free trade regime, at least in the U.S., public opinion seems to be generally supportive of keeping anti-dumping laws. However, an anti-dumping case in the context of Alaska salmon may pose a substantial problem in that it requires a determination that wild and farmed salmon are like products. Ignoring what are significant environmental, public health and cultural distinctions between wild and farmed salmon for the sake of an anti-dumping suit is in direct conflict with the efforts of environmentalists and labor and human rights advocates who argue for including these non-economic considerations throughout GATT/WTO policy. Thus, while an anti-dumping case in this context might help Alaskan salmon-fishers in the short term, in the long run, wild-capture fisheries will most likely be better served by increased environmental regulation of aquaculture, eco-labeling, and pricing schemes which include costs which are now externalized, such as harm to the environment. In the absence of real recognition of environmental concerns in the WTO, traditional fishers will be well-served to advocate for the continued availability of anti-dumping laws as they now exist in the U.S. Real change, and real protection, however, can really only come with a shift in the focus of the global trading system, or limits on this system in terms of concrete environmental protections. In the long-term, only a system which recognizes environmental and cultural values as well as economic factors can ever truly protect ocean resources and the fishing communities that depend on these resources for their livelihoods.

172. *See* MSC *Alaska Salmon*, *supra* note 119.

173. *See* GATT Panel Report on United States - Restrictions on Imports of Tuna (1991) and (1994), *supra* note 162.

174. *See* Doha Declaration, *supra* note 20, ¶ 32 (iii).

175. Eagle et al., *supra* note 10, at 710.